Coastal Marine Services, Inc. *and* International Association of Heat & Frost Insulators and Allied Workers, Local 5. Case 21–CA–139031

January 10, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On March 1, 2016, Administrative Law Judge Robert A. Giannasi issued a decision in this case. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. In addition, the Charging Party filed exceptions and a supporting brief, and the Respondent filed an answering brief. Pursuant to a grant of the request for additional briefing, the Charging Party filed a supplemental brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The judge found, applying the Board's decisions in *D. R. Horton*, 357 NLRB 2277 (2012), enf. denied in relevant part 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), enf. denied in relevant part 808 F.3d 1013 (5th Cir. 2015), that the Respondent violated Section 8(a)(1) of the National Labor Relations Act by maintaining and enforcing an Employee Acknowledgement and Agreement that requires employees, as a condition of employment, to waive their rights to pursue class or collective actions involving employment-related claims in all forums, whether arbitral or judicial.

Recently, the Supreme Court issued a decision in *Epic Systems Corp. v. Lewis*, 584 U.S. ___, 138 S.Ct. 1612 (2018), a consolidated proceeding including review of court decisions below in *Lewis v. Epic Systems Corp.*, 823 F.3d 1147 (7th Cir. 2016), *Morris v. Ernst & Young, LLP*, 834 F.3d 975 (9th Cir. 2016), and *Murphy Oil USA, Inc. v. NLRB*, 808 F.3d 1013 (5th Cir. 2015). *Epic Systems* concerned the issue, common to all three cases, whether employer-employee agreements that contain class- and collective-action waivers and stipulate that employment disputes are to be resolved by individualized arbitration violate the National Labor Relations Act. Id. at __, 138 S.Ct. at 1619–1621, 1632. The Supreme Court held that such employment agreements do not violate this Act and that the agreements must be enforced as written pursuant to the Federal Arbitration Act. Id. at __, 138 S.Ct. at 1619, 1632.

The Board has considered the decision and the record in light of the exceptions and briefs. In light of the Supreme Court's decision in *Epic Systems*, which overrules the Board's holding in *Murphy Oil USA, Inc.*, we conclude that the complaint allegation that the mandatory arbitration agreement is unlawful based on *Murphy Oil* must be dismissed.

ORDER

The complaint is dismissed.[2]

Dated, Washington, D.C. January 10, 2019

_____
John F. Ring, Chairman

_____
Marvin E. Kaplan, Member

_____
William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Ami Silverman, Esq., for the General Counsel.
L. Brent Garrett, Esq. (Fisher & (Phillips, LLP), for the Respondent.
David A. Rosenfeld, Esq. (Weinberg Roger & Rosenfeld), for the Charging Party.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was submitted to the Judges Division on a stipulated record and assigned to me by Order dated February 10, 2016.[1] Paragraph 4

[1] In addition, pursuant to *Reliant Energy*, 339 NLRB 66 (2003), the Charging Party filed letters calling the Board's attention to recent case authority.

[2] The Charging Party's brief in support of exceptions and its supplemental brief filed after the Supreme Court's decision in *Epic* raise numerous arguments that are wholly outside the scope of the General Counsel's complaint. At no point in this litigation has the General Counsel argued that a violation must be found on any basis other than the rationale underlying the holding in *Murphy Oil*. It is well settled that a charging party cannot enlarge upon or change the General Counsel's theory of a case. See, e.g., *SJK, Inc. d/b/a Fremont Ford*, 364 NLRB No. 29, slip op. at 2 fn.1 (2016) (rejecting similar arguments made by charging party in addition to *Murphy Oil* theory of violation), and *Hobby Lobby Stores, Inc.*, 363 NLRB No. 195, slip op. at 1 fn. 2 (2016) (same); see also *Kimtruss Corp.,* 305 NLRB 710 (1991). We therefore find no need to address individually the other issues raised by the Charging Party.

[1] A portion of the case was resolved by a settlement agreement between the parties. The remaining portion was submitted on partial

of the complaint alleges that, since at least April 25, 2014, Respondent has maintained as a condition of employment for all its employees at its San Diego facility an "Employee Acknowledgement and Agreement" that contains provisions requiring employees to resolve employment-related disputes exclusively through individual arbitration proceedings and to relinquish any rights they have to resolve disputes through collective or class action, in violation of Section 8(a)(1) of the Act. Respondent filed an answer denying the alleged violation. The General Counsel, the Respondent and Charging Party Union (hereafter the Union) all filed briefs in support of their positions, which I have read and considered.

Based on the entire record in this case, including the stipulation, the agreed upon exhibits, and the briefs of the parties, I make the following:

FINDINGS OF FACT

The stipulation of the parties sets forth the following:

> . . . .
>
> 4. (a) At all material times, Respondent, a California corporation, with a warehouse facility located in San Diego, California, has been engaged in the nonretail business of performing insulation work on ships.
>
> (b) During the 12-month period ending November 5, 2014, a representative period, Respondent, in conducting its business operations described above in paragraph 4(a), performed services valued in excess of $50,000 in States other than the State of California.
>
> (c) During the 12-month period ending November 5, 2014, Respondent in conducting its operations described above in paragraph 4(a), purchased and received at its San Diego, California facility goods valued in excess of $50,000 directly from points outside the State of California.
>
> (d) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2)(6)(7) of the Act.
>
> 5. At all material times, the Union is a labor organization within the meaning of Section 2(5) of the Act.
>
> 6. At all material times, and since at least on or about April 25, 2014, Respondent has maintained as a condition of employment for all of its employees at the San Diego facility an agreement titled "Employee Acknowledgement and Agreement," a copy of which is attached to the Complaint as Appendix A, and which is also attached as Exhibit 7.

In pertinent part, the agreement set forth in Exhibit 7 requires the employee to agree to "utilize binding arbitration as the sole and exclusive means to resolve all disputes that may arise of or be related in any way to my employment . . . ." It also provides that, by signing the agreement, the employee agrees to "waive any substantive or procedural rights that I may have to bring an action on a class, collective, private attorney general, representative or other similar basis." It further provides that the employee may check a box at the end of paragraph 3 of the agreement to retain those rights, which are otherwise waived.

The stipulation continues as follows:

> 7. (a) General Counsel takes the position that at all material times since at least on or about April 25, 2014, employees would reasonably conclude that the provisions of the "Employee Acknowledgement and Agreement" attached as Exhibit 7 and described above in paragraph 6, preclude employees from engaging in conduct protected by Section 7 ofthe Act.
>
> (b) Respondent takes the position that at all times since at least on or about April 25, 2014, employees would not reasonably conclude that the provisions of the "Employee Acknowledgment and Agreement" attached as Exhibit 7[2] and described above at paragraph 6, preclude employees from engaging inconduct protected by Section 7 of the Act.

The Issue Presented

Whether Respondent's Employee Acknowledgment and Agreement violates Section 8(a)(1) of the Act.

Discussion and Analysis

The Board has held that maintaining mandatory agreements requiring employees to pursue individual rather than collective arbitration and court actions with respect to employment disputes interferes with substantive rights guaranteed by Section 7 of the Act and therefore violates Section 8(a)(1) of the Act. See *Flyte Tyme Worldwide*, 363 NLRB No. 107 (2016), citing and relying upon *D. R. Horton, Inc*., 357 NLRB 2277 (2012), enf. denied in relevant part, 737 F.3d 344 (5th Cir. 2013) and *Murphy Oil USA, Inc.,* 361 NLRB 774 (2014), enf. denied in relevant part, __F.3d __, 2015 WL 6457613 (5th Cir. Oct. 26, 2015). Accord: *Bristol Farms*, 363 NLRB No. 45 (2015); *Solar City Corp*., 363 NLRB No. 83 (2015); *Century Fast Foods, Inc*., 363 NLRB No. 97 (2016); *Fuji Food Products, Inc*., 363 NLRB No. 118 (2016); *Multiband EC, Inc*., 363 NLRB No. 100 (2016); and *Network Capital Funding Corp.,* 363 NLRB No. 106 (2016). As an administrative law judge, I am bound to follow Board decisions unless they are reversed by the Board itself or the Supreme Court. See *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004).

The Employee Acknowledgement and Agreement in this case falls squarely within those agreements found unlawful by the Board in the above cases. In *D.R. Horton*, the Board applied the test in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), and found that an agreement requiring employees to waive their right to collectively pursue employment-related claims violated the Act because "it expressly restricts Section 7 activity, or, alternatively, because employees would reasonably read it as restricting such activity." 357 NLRB 2277, 2283. Thus, the Board concludes that such agreements themselves, by their language and their mandatory application, reasonably interfere with Section 7 rights. I therefore find the agreement herein

stipulation of facts and exhibits. On December 14, 2015, Judge Jeffrey Wedekind issued an order approving the partial stipulation, rejecting the Charging Party Union's three objections to the partial stipulation.

[2] This paragraph of the stipulation submitted to me and as set forth in the complaint erroneously describes the agreement as Exh. 8.

similarly violative of Section 8(a)(1) of the Act.[3]

In its brief (Br. 3–9), Respondent cites numerous court decisions that are contrary to the Board's rationale set forth in its *D. R. Horton* and *Murphy Oil* decisions and asks me to reject those Board decisions because they are no longer "good law." I am not, however, authorized to do so, as indicated above. Moreover, the Board has repeatedly reaffirmed the rationale of its seminal decisions on the issue, as I have also indicated above. Those decisions have already rejected the kinds of arguments implicitly made in Respondent's brief by its string cites to court cases disagreeing with the Board's views. I need not treat those implicit arguments further here. Respondent does explicitly make two arguments in this respect—that no employees engaged in concerted activities in this case; and that the agreement here was saved from illegality because of its opt-out provision permitting employees to check a box if they wanted to preserve collective rights (Br. 9–11). But the Board has rejected both of these arguments as well. As to the opt-out feature, see *AT&T Mobility Services, LLC*, 363 NLRB No. 99 (2016), citing cases (such opt out clauses are unlawful because they require employees "to prospectively waive their Section 7 right to engage in concerted activity."); and, as to the concerted activity argument, see *AT&T*, above, 363 NLRB No. 99, at fn. 3.[4]

CONCLUSIONS OF LAW

1. By maintaining its Acknowledgement and Agreement as a condition of employment, Respondent has violated Section 8(a)(1) of the Act.

2. The above violation is an unfair labor practice within the meaning of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist from its unlawful conduct and to take certain affirmative action designed to effectuate the policies of the Act. Having found that the Respondent's Employee Acknowledgement and Agreement is unlawful, Respondent shall be ordered to rescind or revise it to make clear to employees that the agreement does not constitute or require a waiver in all forums of their right to maintain or participate in collective and/or class actions, and shall notify employees of the rescinded or revised agreement by providing them a copy of the revised policy or specific notification that the agreement has been rescinded. Respondent is also ordered to distribute appropriate remedial notices to its employees electronically, such as by email, posting on an internet or intranet site, and/or other appropriate electronic means, if it customarily communicates with its employees by such means. *J.C. Picini Flooring,* 356 NLRB 11 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[5]

ORDER

Respondent, Coastal Marine Services Inc., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory and binding arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Rescind its Employee Acknowledgement and Agreement in all of its forms or revise it in all of its forms to make clear to employees that the agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums.

(b) Notify all current and former employees who were required to sign or otherwise became bound to the Employee Acknowledgement and Agreement in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Within 14 days after service by the Region, post at its facilities where the Employee Acknowledgement and Agreement is or has been in effect copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic

[3] The Union's brief advances many arguments in support of the view that the Federal Arbitration Act (the FAA) does not apply in this case. I do not address those arguments here because the Board has essentially treated the issue in *D. R. Horton* and *Murphy Oil*.

[4] Respondent also asserts (Br. 11–12) that a legal memorandum issued by the Office of General Counsel's Division of Operations Management discussing the effects of the Board's *D. R. Horton* decision revoked an earlier pre-*D. R. Horton* guideline memorandum of the General Counsel. According to Respondent, that second memorandum was issued in violation of the Administrative Procedure Act because it was not preceded by notice and comment required of agency rulemaking. It is not clear whether Respondent's effort means to fault the Board or the General Counsel. But insofar as it seeks to invalidate the Board's rationale in *D. R. Horton*, Respondent's contention is without merit. The second memorandum was simply a recognition of clear Board law as a result of the *D. R. Horton* decision, just as the first one was an opinion based on the ambiguity of Board law before *D. R. Horton*. Moreover, it is the Board's decisions that are pertinent here, not the General Counsel's views of those decisions. The General Counsel's office is the prosecuting arm of the Agency. The Board is the judicial arm of the Agency. And, in *D. R. Horton*, the Board appropriately decided the issue by adjudication, not by rulemaking. See *NLRB v. Bell Aerospace Co*., 416 U.S. 267, 290–295 (1974).

[5] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 17, 2014.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 21 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 1, 2016.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and hasordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory and binding arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain class or collective actions in all forums, whether arbitral or judicial.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL rescind our Employee Acknowledgement and Agreement in all of its forms or revise it in all of its forms to make clear to employees that the agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums.

WE WILL notify all current and former employees who were required to sign or otherwise became bound to the Employee Acknowledgement and Agreement in any form that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

COASTAL MARINE SERVICES, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/21-CA-139031 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.